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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-358

JNO. McCALL COAL COMPANY, INC., a Maryland corporation, CLYBORNE, INC., a West Virginia corporation, and VERNICE H. CLYBORNE, Executrix of the will of C.A. Clyborne, deceased,

Petitioners,

v.

RUTH M. CULBERTSON, Executrix of the will of William M. Culbertson, Jr., deceased, last surviving partner of the partnership of J.H. Franks and William M. Culbertson, Jr., doing business as Whitewood Smokeless Coal Company,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DESIGNATION OF PARTIES

William M. Culbertson, Jr., J.H. Franks, Whitewood Smokeless Coal Company, Jno. McCall Coal Company,

Inc., and C.A. Clyborne, when referred to separately, will be designated as Culbertson, Franks, Whitewood, McCall and Clyborne, respectively. Jno. McCall Coal Company, Inc., Clyborne, Inc., and C.A. Clyborne, when referred to collectively, will be referred to as defendants.

REFERENCES TO RECORD AND EXHIBITS

This case was tried before the District Court on October 10, 11 and 12, 1966. Following the hearing in the District Court, the case was referred to W.T. Hancock, Special Master. References to the transcript of the hearing in the District Court will be Ct. Tr. ____. References to the exhibits filed in the District Court will be Pl. Ct. Ex. ____, or Ds. Ct. Ex. ____. References to the transcript of the hearings before the Special Master will be Tr. ____. References to the exhibits filed before the Special Master will be Pl. Ex. ____ or Ds. Ex. ____. References to the Appendix to the Petition filed herein will be App. ____.

QUESTIONS PRESENTED

1. Would the evidence heard in the District Court, and by the Special Master, have justified a finding that Whitewood was guilty of unclean hands to an extent which would deny it relief in a court of equity?

2. Did the District Court commit prejudicial error in failing to make a specific finding of fact with reference to the defense of unclean hands?

3. Did the Circuit Court of Appeals, in failing to discuss, or make a specific finding with reference to the defense of unclean hands, deprive petitioners of property without due process of law, in violation of Amendment V to the Constitution of the United States?

4. Did the Circuit Court of Appeals, in failing to make a specific finding with reference to the defense of unclean hands, so far depart from the accepted and usual course of judicial proceedings, or so far sanction such a departure by the District Court, as to call for an exercise of this Court's power of supervision?

STATEMENT OF THE CASE

Kind of Action

This is a civil action instituted by William M. Culbertson, Jr., a member of a partnership known as Whitewood Smokeless Coal Company, formerly engaged in mining and shipping coal in Buchanan County, Virginia, for the purpose of requiring defendants to account for the proceeds of sales of Whitewood's coal shipped by Whitewood to McCall, during the period July 1, 1948 to December 31, 1955, less agreed sales commissions, and to recover the amount due, with interest and punitive damages. The Complaint also asks that defendants be required to return to Whitewood the sales commissions retained by McCall on sales with respect to which McCall did not properly account.

The Complaint alleged, and the proof showed, that by virtue of a written lease, dated June 20, 1947, from

J.H. Franks and C.A. Clyborne, to Culbertson and Franks (Pl. Ct. Ex. 1), the latter were given the right and privilege of mining, by deep mining methods, the Cary seam of coal located on the Hinton tract of approximately 1,100 acres of land, and the Gillespie tract of 2,314 acres of land, all of which land was located in Buchanan County, Virginia. In consideration of such mining rights, Franks and Culbertson agreed to pay to Clyborne and Franks, as lessors, certain royalties on all coal mined.

The said lease agreement further provided as follows:

> "It is further covenanted and agreed between all the parties herein and by the Lessees that C.A. Clyborne or his assignee shall be the Exclusive Distributor for the entire output of all coal mined and produced from all of the tracts of land under this lease during the entire life of this lease and any renewal thereof;
>
> "The said C.A. Clyborne as Exclusive Distributor covenants for himself and his Assignee that he will use all reasonable and diligent efforts in selling and disposing of said coal at the best available market price; in consideration of said services as Exclusive Distributor, the said C.A. Clyborne or his Assignee shall receive a *sales commission* of Twenty Cents (20¢) per net ton of two thousand (2,000) pounds of all coal sold. In the event that market conditions become such that the selling expenses for handling this coal increases or selling costs can be shown that justify any change, the said C.A. Clyborne as distributor or *sales agent* shall receive eight per cent (8%) of the realized price on any coal sold as *sales commission.*"

The above mentioned agreement was prepared by defendants' attorney.

Shortly after the execution of said agreement, Clyborne orally assigned to McCall such rights as he, Clyborne, had thereunder to act as "exclusive distributor," or "sales agent," for Whitewood's coal. Following said oral assignment, McCall designated defendant Clyborne, Inc., as its agent to sell the Whitewood coal, and agreed to pay Clyborne, Inc. 70% of the commissions received from Culbertson and Franks. McCall retained 30% of the commissions received. Clyborne and wife owned practically all of the Clyborne, Inc. stock.

During the period July 1, 1948 to June 15, 1954, Whitewood Smokeless Coal Company, a partnership consisting of J.H. Franks and William M. Culbertson, Jr., was engaged in mining coal in Buchanan County, Virginia, which coal it delivered in railroad cars at its tipple to McCall, Whitewood's alleged sales agent. The coal was usually consigned to McCall at the railway company's scales at either Bluefield, West Virginia or Portsmouth or Roanoke, Virginia. Except in rare instances, Whitewood did not know the destinations of its coal, or the names of the purchasers.

Franks became ill about June 15, 1954, and retired from the firm and thereafter Culbertson continued to mine coal in the name of Whitewood Smokeless Coal Company, and this coal was likewise delivered in railroad cars, at Whitewood's tipple, to McCall. During the period July 1, 1948 to December 31, 1955, Whitewood delivered to McCall a total of 246,014.10 tons of coal which McCall sold, or otherwise disposed of.

DEFENDANTS' ANSWER

The Answer filed on behalf of defendants alleges that during the period June 1947 through January 1949, McCall paid to Whitewood the prices received by McCall for Whitewood's coal, less the agreed selling commissions. The Answer further alleges "that effective February 1, 1949, by mutual agreement, the agency portion of said Exclusive Distributorship Agreement was terminated, and that thereafter the said Jno. McCall Coal Company, Inc. purchased the coal from the plaintiff, trading as Whitewood Smokeless Coal Company, at prices agreed upon between the parties from time to time, and which prices were thereafter paid by Jno. McCall Coal Company, Inc. to the said Whitewood Smokeless Coal Company in the ordinary course of business."

The Answer also pleads the 5 and 10 year Statutes of Limitations.

Thus the two questions initially presented to the District Court were first, whether the "agency portion" of the agreement dated June 20, 1947 (Pl. Ct. Ex. 1) was terminated by mutual agreement of the parties as of February 1, 1949, as contended by defendants, and if not, whether plaintiff's claim was barred by the 5 or 10 year statute of limitations.

J.H. FRANKS AND HIS COMMITTEE ARE MADE INVOLUNTARY PLAINTIFFS

At the hearing in the District Court, Culbertson testified that when Franks ceased working and

withdrew from the partnership in June of 1954, he and Franks entered into two written agreements (Pl. Ct. Exs. 25 and 26), by the terms of which he, Culbertson, took over all of the assets of the partnership, consisting largely of obsolete mining equipment, and assumed and paid Whitewood's debts and liabilities, and took the position that he, Culbertson, had the right to maintain this action in his own name.

However, at the hearing in the District Court, defendants called as witnesses Mrs. Cora Franks, the wife of J.H. Franks, J.C. Franks, the son of J.H. Franks, and Dr. Joseph Robinson, and the testimony of these witnesses indicated that J.H. Franks was mentally incompetent when he entered into the two written agreements with Culbertson (Pl. Ct. Exs. 25 and 26).

Upon the completion of such testimony, counsel for Culbertson moved the Court to make J.H. Franks a party to the action. However, the District Court held that the questions of agency, and statute of limitations, should first be decided, and if these questions were decided in favor of Whitewood, then Whitewood's motion to make J.H. Franks a party, would be considered.

Following the hearing in the District Court, J.H. Franks was adjudged a mental incompetent, following which Culbertson again moved for an order making J.H. Franks, and his committee, involuntary plaintiffs to this action.

Later, the District Court, in its Memorandum dated July 18, 1967, held that J.H. Franks lacked sufficient mental competency or understanding at the time of the execution of the agreements in question (Pl. Ct. Exs. 25 and 26), to adequately comprehend their legal signifi-

cance, and that said agreements were not binding on Franks. The Court also held that J.H. Franks was an indispensable party to this action.

Later, on July 25, 1967, over defendants' objection, the District Court entered an order making Franks and his committee involuntary plaintiffs herein.

In the District Court's Memorandum dated July 18, 1967, the Court said: "I find nothing in the evidence, however, to suggest that Mr. Culbertson made any false or fraudulent representations or exercised any undue influence to or over Mr. Franks to induce him to sign these writings. In fact just the contrary appears, for Mrs. Franks testified that she remembered that on at least one occasion Culbertson tried to get her husband to join with him in prosecuting a suit against these defendants. Culbertson testified to other attempts to get Mr. Franks to join with him in this action, and there is no evidence in contradiction."

The Court's statement is fully supported by the testimony of Mrs. Cora Franks (Ct. Tr. 483-489) and by Culbertson's testimony (Ct. Tr. 368-375; 436-444). At the time in question, J.H. Franks was 79 years of age and in bad health. Mrs. Cora Franks was 78 years of age.

THE DISTRICT COURT'S OPINION DATED SEPTEMBER 28, 1967

On September 28, 1967, the District Court handed down its written opinion, which is reported in 275 F. Supp. 662 (App. 1a). The District Court, in its Findings

of Fact and Conclusions of Law held in substance (App. 40a - 42a):

1. Pursuant to the terms of the written lease and agreement dated June 20, 1947, between Franks, Culbertson and Clyborne (Pl. Ct. Ex. 1), McCall, as Clyborne's assignee, became the exclusive sales agent for the sale of all coal mined and produced by Whitewood, from the lands described in said lease.

2. The said agreement was not changed or modified as of February 1, 1949, as testified by Clyborne, but to the contrary, the agreement continued in full force and effect during the entire period June 20, 1947 to December 31, 1955, except that the agreement with respect to McCall's sales commissions was modified.

3. During the period July 1, 1948 to September 23, 1948, pursuant to said lease and agreement dated June 20, 1947, McCall was entitled to receive for its services in selling Whitewood's coal 20¢ per net ton. During the period September 23, 1948 to September 3, 1951, pursuant to said lease and agreement dated June 20, 1947, McCall was entitled to receive for its services in selling Whitewood's coal a commission of 8% of the selling price. During the period September 3, 1951 to December 31, 1955, pursuant to an oral agreement between Franks and Culbertson and McCall, later confirmed by correspondence (Pl. Ct. Exs. 4 and 5) McCall was entitled to receive for its services in selling Whitewood's coal a commission of 25c per net ton.

4. During the entire period July 1, 1948 to December 31, 1955, Franks and Culbertson believed, and were justified in believing, that McCall was paying to Whitewood for its coal, the sales prices received by McCall for said coal, less the commissions to which

McCall was entitled under the written agreement dated June 20, 1947, as modified by the agreement effective September 3, 1951.

5. During the period July 1, 1948 to December 31, 1955, neither Franks nor Culbertson had reasonable cause or grounds to believe, or suspect, that McCall was not accounting to Whitewood for the proceeds of sales of Whitewood's coal, less McCall's agreed selling commissions.

6. During the period July 1, 1948 to December 31, 1955, McCall did not pay to Whitewood the full proceeds of sales of Whitewood's coal, less McCall's agreed selling commissions. To the contrary, during said entire period McCall, through copies of orders and mine sheets furnished by McCall to Whitewood, consistently concealed from Whitewood the prices received by McCall for Whitewood's coal.

7. Neither Franks nor Culbertson knew, or had reasonable cause to believe, until the latter part of 1963, that McCall, during the period July 1, 1948 to December 31, 1955, had misrepresented to Whitewood, or was concealing from Whitewood, the prices obtained by McCall for Whitewood's coal, or that during said period McCall had underpaid Whitewood for its coal.

The District Court also held that certain evidence offered by Whitewood with respect to transactions between defendants and Pine Oaks Coal Corporation, during the period 1955-1961, was admissible for the purpose of showing a general plan or scheme on McCall's part to deceive. We quote from the District Court's opinion discussing the Pine Oaks evidence (App. 23a-24a):

"We reach this decision because it appears that the circumstances in the Pine Oaks case, as shown by the record, were so similar in nature and point of time to those of the instant case that they tend to show a general plan or scheme on the part of McCall to deceive. A detailed recital here of the facts and circumstances of the Pine Oaks case would seem to be unnecessary to a resolution of the issues involved in the case before us. Suffice it to say that Pine Oaks, becoming suspicious that McCall was not properly accounting to it, engaged counsel to take the matter up with McCall. Counsel so employed wrote McCall requesting permission to examine McCall's books. McCall responded by saying it was not indebted to Pine Oaks in any amount, but that Pine Oaks was indebted to it for an amount 'largely in excess of the amount due for coal invoiced,' plaintiffs' Exhibit No. 12, see also McCall's testimony, Tr. 194. Later, there was a conference between McCall, Clyborne, and their attorneys on the one hand, and Pine Oaks and its attorneys on the other, at which it was agreed that Pine Oaks could audit McCall's books, Tr. 194-200. However, the next day McCall's check, dated December 20, 1961, for $33,671.05, payable to Pine Oaks Coal Corporation, was mailed out of McCall's Baltimore office to Pine Oaks, accompanied by a letter, plaintiffs' Exhibit No. 13. McCall posted on its ledger a credit memorandum in favor of Pine Oaks in the sum of $44,807.38, Tr. 194-5, indicating the advances it had made Pine Oaks against coal shipped amounted to only $11,136.33, leaving owing to Pine Oaks a balance of $33,671.05, which Pine Oaks later accepted as a satisfactory adjustment of the account.

* * * * *

"All of the testimony concerning the sales of Pine Oaks' coal by McCall was offered by Culbertson for the purpose of showing that McCall perpetrated a fraud on Pine Oaks, similar to the alleged fraud perpetrated by McCall on Whitewood, and such testimony is now admitted into evidence and considered by the Court for that purpose only."

THE SECOND AMENDED AND SUPPLEMENTAL COMPLAINT FILED JULY 23, 1968

The Second Amended and Supplemental Complaint alleged that during the period July 1, 1948 to December 31, 1955, inclusive, Whitewood, with the knowledge, consent and approval of defendants, *purchased* a substantial tonnage of coal, not mined on the property referred to in said lease and agreement, dated June 20, 1947, and shipped and delivered the purchased coal to McCall with the understanding and agreement that McCall would account to Whitewood, for the proceeds of sales of said purchased coal, on the same basis, and for the same sales commissions, that McCall was required to account to Whitewood, for the coal mined and produced by Whitewood, from the *leased* property, and shipped to McCall. It was further alleged that McCall did not so account, but to the contrary, wilfully and intentionally misrepresented to Whitewood, the prices received by McCall, for the coal purchased by Whitewood, and shipped to McCall, and wilfully and intentionally underpaid Whitewood for said coal.

The order of July 23, 1968, permitting plaintiff to file his Second Amended and Supplemental Complaint, also referred the case to W.T. Hancock, Special Master.

DEFENDANTS' ANSWER TO THE SECOND AMENDED AND SUPPMENTAL COMPLAINT, AND DEFENDANTS' FIRST AND SECOND COUNTERCLAIMS.

Defendants' answer asserted that the cause of action pleaded in the Second Amended and Supplemental Complaint was barred by the West Virginia Statute of Limitations. The answer also alleged that the Second Amended and Supplemental Complaint was fraudulent and was not filed in good faith.

Defendants' Answer to the Second Amended and Supplemental Complaint also contained two counterclaims against plaintiff – the First Counterclaim and the Second Counterclaim:

The First Counterclaim alleged that by virtue of said lease and agreement dated June 20, 1947 (Pl. Ct. Ex. 1) Whitewood was required to ship to McCall *all* of the coal mined by Whitewood on the property described in the lease, but contrary to the terms of said lease and agreement, and without McCall's knowledge, consent or approval, Whitewood sold to other parties, a substantial quantity of the coal mined by Whitewood on said leased property; that Whitewood had fraudulently concealed said sales from McCall; and that McCall was damaged thereby.

The Second Counterclaim alleged that it was Whitewood's duty under said lease and agreement, to ship to McCall *only* the coal mined on said leased property, but that Whitewood, without McCall's knowledge, consent or approval, *purchased* a large quantity of coal, inferior in quality to the coal mined on said lease, and mixed the *purchased* coal with the coal mined on the leased property, and shipped the

mixed coal to McCall; and that McCall, without knowledge of the facts, shipped said coal to its customers and thereby sustained damage.

Defendants alleged in their First and Second Counterclaims that Whitewood was guilty of fraud, and demanded compensatory and punitive damages.

A considerable amount of evidence pertaining to said Counterclaims, was introduced before the Special Master, but in the end, defendants apparently abandoned both Counterclaims, since they did not mention either of the Counterclaims in their briefs to the Special Master or the District Court. The Special Master and the District Court found against defendants on both Counterclaims and the Counterclaims were not involved on the appeal to the Circuit Court of Appeals.

DEFENDANTS' MOTION FOR AMENDMENT AND/OR CLARIFICATION OF ORDER OF REFERENCE

On December 17, 1968, at a hearing before the Special Master, plaintiff offered in evidence a schedule prepared by B.F. Jones, a certified public accountant—said schedule being identified as Plaintiff's Exhibit No. 19. The exhibit purported to show all of the coal shipped by Whitewood to McCall, the prices received by McCall for the coal, the prices paid by McCall to Whitewood, and the commissions deducted by McCall.

Defendants objected to the exhibit on the ground that the Cary coal mined by Whitewood from the Hinton-Gillespie lease, and shipped to McCall, was not shown separately from other coal purchased or otherwise acquired by Whitewood, and also shipped to

McCall. Defendants contended that the exhibit was inadmissible, because it did not identify any particular car of coal as coming from the Hinton-Gillespie tract or as being acquired by Whitewood from other sources.

Plaintiff contended that there was an implied agreement between Whitewood and McCall that the Cary coal mined on the Hinton-Gillespie tract, and shipped to McCall, and coal acquired by Whitewood from other sources and shipped to McCall, would all be accounted for on the same basis and in the same manner, and that therefore, it was immaterial that none of the shipments made by Whitewood to McCall, could be identified as coming from the Hinton-Gillespie tract, or from other sources.

At that time, (Tr. 316) the Special Master stated that he would reserve his ruling on the admissibility of Plaintiff's Exhibit No. 19. The discussion of this exhibit between counsel for plaintiff and defendants appears on pages 302-316 of the transcript.

Later, on March 19, 1969, at a hearing before the Special Master, and after plaintiff had rested his case, counsel for defendants requested the Special Master to rule on the admissibility of Plaintiff's Exhibit No. 19, prior to the introduction by defendants of their evidence. Thereupon, the Special Master ruled that the Plaintiff's Exhibit No. 19 would be received in evidence, (Tr. 1131-2).

Counsel for defendants then requested an adjournment of the hearings before the Special Master in order to give defendants an opportunity to present the matter to the District Court, and obtain the Court's ruling on the admissibility of Plaintiff's Exhibit 19. Such permission was granted, and on February 4, 1970,

defendants filed their Motion for Amendment and/or Clarification of Order of Reference, and the Motion was argued before the District Court.

Later, by an order entered on April 24, 1970, the District Court denied in part, and granted in part, said motion. We quote from said order:

> "The Court has reviewed with the Special Master the evidence adduced before him and, considering it in light of all the circumstances surrounding the parties and their *modus operandi* we reach the conclusion that the plaintiff has made a *prima facie* showing sufficient to raise and support an implied understanding that the same commission arrangement the parties had with reference to the Hinton-Gillespie coal would be applied to the outside coal as well, and further, that since essentially the same circumstances are found to exist, on the question of concealment of prices received for the purchased coal as those previously found to have existed, with reference to the prices received for the leased coal, our previous ruling on the question of the tolling of the statute of limitations as to the leased coal will also apply to and govern the question of the tolling of the statute of limitations with reference to the purchased coal. We reserve, however, the right to re-examine these questions and possibly reach contra conclusions at the close of all the evidence. We further find from plaintiff's evidence that it is not now possible for him to separate by quantity the coal shipped off the Hinton-Gillespie lease from the coal shipped from purchased coal, and that unless the defendants can by their own evidence establish a reasonably accurate basis for such separation, the Special Master shall ascertain and determine the amounts, if any, due and owing with respect to *all* coal shipped and delivered by

the plaintiff to the defendants without regard to the source of such coal."

However, apparently defendants abandoned their contention that the coal mined on the leased property, and shipped to McCall, should have been shown separately from the other coal purchased, or otherwise acquired by Whitewood, and shipped to McCall, since they did not object to the action of the Special Master or the District Court, in overruling this contention, and did not present that issue to the Circuit Court of Appeals for review.

THE SPECIAL MASTER'S REPORT OF MAY 3, 1972

The Special Master's report contains Findings of Fact and Conclusions of Law. Many of the Special Master's findings are not now material, since they were not presented for review in the Circuit Court of Appeals. However, included in the Special Master's Findings of Fact, although not in the order shown in the report, or in the exact words of the Special Master, are the following Findings of Fact (App. 73a-77a):

1. During the period July 1, 1948 to December 31, 1955, Whitewood shipped to McCall, 246,014.10 tons of coal which McCall accepted and sold to others.

2. The major portion of this coal was from the leased property described in the Agreement of June 20, 1947, but a substantial portion thereof was coal purchased by Whitewood from others, and it was impossible to determine what part of the coal shipped was leasehold coal and what part was purchased coal.

3. McCall knew, and consented to the shipping of outside coal by Whitewood to McCall, and there was an implied agreement between McCall and Whitewood, that all coal shipped by Whitewood to McCall would be accounted for as required by the Agreement of June 20, 1947.

4. In certain instances, McCall paid Whitewood for its coal, an amount greater than the full proceeds of sales, less agreed selling commissions, the total of said overpayments being $1,462.96. In 630 instances McCall paid Whitewood the full proceeds of sales less the agreed selling commissions. In 1,050 transactions McCall paid Whitewood for its coal, an amount which was less than the full proceeds of sales, less the agreed selling commissions, the total of these "underpayments" being $50,337.23. During said period, the net amount of such underpayments by McCall to Whitewood, for all coal shipped by Whitewood to McCall was $48,874.28.

5. The commissions deducted and retained by McCall, in those instances where it "underpaid" Whitewood, amounted to $56,092.07, and all of such commissions were on sales as to which the selling prices were wilfully and intentionally underreported to Whitewood.

6. During the period July 1, 1948 to December 31, 1955, without Whitewood's knowledge, consent or approval, McCall sold 37,027.95 tons of Whitewood's coal to American Southern Export Company, and American Southern Export Company realized a profit of 20¢ per ton on the resale of said coal. The defendants "effectively controlled American Southern and enjoyed substantially its business and its profits."

7. The commissions deducted by McCall from its settlements with Whitewood for the coal sold to American Southern Export Company, exclusive of commissions on the underpayments previously referred to, amounted to $6,569.52.

Under Conclusions of Law, the Special Master found as follows (App. 77a-78a):

"1. Under the written agreement of June 20, 1947, as modified from time to time by the parties, and the subsequent implied agreement between Whitewood and McCall that the terms of the written agreement would apply to all of the coal shipped by Whitewood to McCall, McCall acted in a fiduciary capacity as agent for Whitewood in the selling of such coal, and is accountable to Whitewood for the price at which it sold all of the coal mined on the leasehold and shipped by Whitewood to McCall during the period July 1, 1948 to December 31, 1955, and all of the coal mined on property other than said leasehold, and purchased by Whitewood, and shipped to McCall during said period.

"2. Neither the West Virginia statute of limitations nor the defense of laches is available to defendants in bar of plaintiff's claims asserted in this action.

"3. McCall underpaid Whitewood in the amount of $48,874.28 for the coal shipped by Whitewood to McCall during the period July 1, 1948 to December 31, 1955, and defendants are indebted to plaintiff in that amount.

"4. Plaintiff is entitled to interest on the aforesaid $48,874.28 at the rate of 6% per annum from December 31, 1955 until paid.

"5. McCall was not entitled, by reason of its improper conduct, to deduct the otherwise proper

commissions in the amount of $56,092.07 for the transactions in which it underpaid Whitewood during the period July 1, 1948 to December 31, 1955, and defendants are indebted to plaintiff in that amount.

"6. By reason of their undisclosed self-dealing in the sale of Whitewood's coal to American Southern Export Company during the period July 1, 1948 to December 31, 1955, defendants are indebted to plaintiff in the sum of $7,405.59.

"7. Plaintiff is entitled to interest on the aforesaid $7,405.59 at the rate of 6% per annum from December 31, 1955 until paid.

"8. McCall was not entitled, by reason of the relationship that existed between defendants and American Southern, to deduct the otherwise proper commissions in the amount of $6,569.52 (exclusive of such as are included among the commissions referred to in Conclusion of Law No. 5 above) for its sales of Whitewood's coal to American Southern during the period July 1, 1948 to December 31, 1955, and the defendants are indebted to plaintiff in that amount.

* * * *

"13. *Plaintiff owes nothing to defendants on account of coal mined from the leasehold described in the agreement of June 20, 1947 and shipped by Whitewood to others than McCall during the period June 20, 1947 to December 31, 1955, or as damages because of coal shipped by Whitewood to McCall which came elsewhere than from the leasehold;* nor are defendants entitled to recover punitive damages from plaintiff in this action."

The Special Master in said report also found that plaintiff was not entitled to recover from defendants on

account of certain other claims made by plaintiff against defendants, and should not recover attorney's fees and accounting fees from defendant. However, none of the claims decided adversely to plaintiff are now in issue.

MEMORANDUM DECISION AND JUDGMENT ORDER ENTERED DECEMBER 15, 1972

In said Memorandum Decision and Judgment Order, which has not been published, the District Court affirmed the Special Master's report as filed, and entered judgment in favor of plaintiff against defendants in the sum of $176,196.[illegible] with interest from December 15, 1972 until paid, and costs (App. 79a).

J.H. FRANKS, WILLIAM M. CULBERTSON, JR., C.A. CLYBORNE, AND VERNICE H. CLYBORNE, EXECUTRIX OF THE WILL OF C.A. CLYBORNE, DECEASED, ARE NOW DECEASED.

J.H. Franks died prior to the completion of the hearings before the Special Master, and William M. Culbertson, Jr. and C.A. Clyborne died subsequent to the completion of said hearings. Vernice H. Clyborne, Executrix of the will of C.A. Clyborne, deceased, died a short time prior to the filing of the Petition For Writ of Certiorari herein. In the event that plaintiff recovers from the defendants, such recovery, after the payment of attorney's fees and expenses, will be divided equally

between the estates of J.H. Franks and William M. Culbertson, Jr.

THE RECORD IN THE DISTRICT COURT AND BEFORE THE SPECIAL MASTER

Hearings in the District Court were held on October 10, 11 and 12, 1966, and January 15, 1968. The transcript of the evidence in the District Court consists of approximately 600 pages, and approximately 40 exhibits, some of them quite voluminous, were introduced in the District Court.

The hearings before the Special Master consumed nine (9) days. The transcript of the evidence before the Special Master consists of approximately 1,600 pages. There were 84 exhibits, several quite voluminous, filed before the Special Master.

The opinions filed by the District Court, and the Special Master's report, indicate that the District Court and the Special Master gave the case the most careful consideration, and were quite careful to protect the interests of the defendants.

STATEMENT OF FACTS

Since a detailed statement of the facts involved herein appears in the District Court's Memorandum Opinion dated September 28, 1967 (App. 1a), and the Special Master's report (App. 43a), and only the question of Whitewood's "unclean hands" has been presented by petitioner to this Court for review, we will

limit our statement of the facts to the evidence bearing upon that particular issue.

1. The Coal Available To Whitewood During The Period July 1, 1948, To December 31, 1955, And The Coal Shipped To McCall.

During the period June 20, 1947, to December 31, 1955, Whitewood mined from the Gillespie and Hinton tracts, leased from Clyborne and Franks, 229,209.27 tons of Cary coal, or at least paid the lessors royalty on that tonnage.

However, 14,963.83 tons were mined prior to July 20, 1948, the date Whitewood began operating its tipple. This 14,963.83 tons was sold by Whitewood to others, with the knowledge, consent and approval of defendants. As to this there is no dispute.

7,271.17 of said tonnage, on which royalty was paid, was Jawbone coal, but Whitewood was not required under the lease to pay royalty on the Jawbone coal to the lessors.

Therefore, the Cary tons mined by Whitewood on the Gillespie Hinton lease which McCall was entitled to receive during the period July 20, 1948, to December 31, 1955, was 206,974.27 tons. See Special Master's report (App. 53a) and Plaintiff's Exhibit 20.

However, during the period July 1, 1948, to December 31, 1955, Whitewood actually shipped McCall 246,014.10 tons of coal (App. 48a). The excess over and above 206,974.27 tons consisted of Jawbone, Cary, Red Ash and Big Banner coal, which Whitewood had purchased from other persons, or had mined from the Jawbone seam on the M. D. Hinton tract.

The purchased coal was as follows:

Jawbone	3,170.80 tons
Cary	40,589.17 tons
Red Ash	2,005.17 tons
Big Banner	5,570.40 tons
Total Tons Purchased	51,335.54 tons

See Plaintiff's Exhibit 20 and Special Master's report (App. 53a and 54a).

Whitewood had only one tipple. Therefore, all of the Cary coal mined on the Hinton Gillespie tract, all of the Jawbone mined from the Jawbone seam on the Hinton tract, and all of the coal purchased by Whitewood, was run through this one tipple and mixed and commingled, and thereafter it was impossible to separate or identify the various coals.

2. Defendants Knew During The Entire Period July 1, 1948 To December 31, 1955, That Whitewood Was Purchasing Various Types Of Coal From Other Parties, And Was Mixing Such Coals With The Coal Mined On The Gillespie Hinton Lease, And Shipping The Mixed Coal To McCall. Defendants Also Knew That In 1950 And The Early Part Of 1951, Whitewood Was Mining Jawbone Coal On The Hinton Tract, Mixing The Jawbone With Cary Coal And Shipping Same To McCall.

As pointed out above, during the period July 1, 1948 to December 31, 1955, Whitewood operated only one tipple. All Cary coal mined by Whitewood from the Gillespie Hinton lease, all Jawbone coal mined from the Jawbone seam on the M. D. Hinton tract, and all coal purchased by Whitewood from others, was run through the same tipple, and mixed and commingled, and

thereafter it was impossible to distinguish the leasehold coal from the other coals. These facts were well known to defendants during the entire period.

During the period in question, Whitewood's mining conditions were quite bad. Frequently rock and slate from the top of the mine would fall, and such rock, slate and other impurities would become mixed with the coal. Whitewood had no washer, or other cleaning facilities, and therefore it was not possible to keep all of the impurities out of the coal (TR. 432-435). These facts were also well known to defendants.

During the hearings before the Special Master, C. A. Clyborne testified that during the period July 1, 1948 to December 31, 1955, Whitewood shipped to McCall a total of 46,310 tons of coal not mined on the leased premises, but that he did not know until December 1967, two years after the institution of this action, that this 46,310 tons of coal was mixed with the Cary coal, and shipped to McCall (Tr. 233-4).

However, the Special Master refused to accept Clyborne's testimony. We quote from the Special Master's report (App. 50a):

> "The evidence clearly shows that defendants had every reason to know McCall was receiving outside coal from Whitewood in addition to the leasehold coal. The royalty reports filed with the Trustee, Perkinson, to whom royalty payments for the leasehold coal were made by Whitewood, would have disclosed that fact to Clyborne. He knew or should have known in what quantities Whitewood was shipping to McCall, and as the owner and recipient of a share in the royalties he knew or should have known the quantities of leasehold coal on which royalties were reported and paid by

Whitewood. The difference would have been quite apparent from only a casual examination. Perkinson also, an officer of Clyborne, Inc., knew or should have known both of these things. (Tr. 147, 148, 171-172, 246-248).

"The evidence further shows that Clyborne did in fact know McCall was receiving outside coal from Whitewood; and that he had no objection to such shipments by Whitewood, at least so long as the coal was of a quality comparable to the leasehold coal. (Tr. 160-162, 164, 166, 200-205, 232-233, 238-241). Plaintiff's Exhibits 21, 22, 23, 40, 41, 42, 43 and 44 show that Perkinson knew it, and it is a fair inference, from those Exhibits, that Clyborne also knew it. See also Defendants' Exhibit 11, Clyborne's letter of February 14, 1951 to Culbertson. Furthermore, Clyborne had an inspector who visited and observed Whitewood's operation on a fairly regular basis, reporting to Clyborne (Tr. 218-219, 241-242). And the record does not show that McCall ever rejected or refused to sell one single car of any coal shipped to it by Whitewood. Culbertson said McCall sold all of it. (Tr. 436). Complaints, yes; corrective action, none. Moreover, it appears that McCall at times was almost desperate for coal, shipping Whitewood's coal in the name of others, some 61 cars, and the coal of others in the name of Whitewood, some 22 cars. (Plaintiff's Exhibits 32, 39, 33, Tr. 1079-1083)."

Plaintiff's Exhibits 21, 22, 23, 40, 41, 42, 43 and 44 referred to by the Special Master, are all letters from Robert E. Perkinson, McCall's representative at Clyborne's Bluefield, West Virginia office, to W. M. Culbertson, Jr. These letters show beyond the slightest doubt, that during the entire period in question,

defendants knew that Whitewood was shipping the outside coal to McCall, and actually encouraged and invited such shipments.

Plaintiff's Exhibit 21, dated August 8, 1952, reads as follows:

> "Referring to our 'phone conversation the forepart of the week regarding coal from J. H. McGlothlin Coal Company and McGlothlin Bros. Coal Company.
>
> "We are enclosing copies of laboratory reports. You can readily see that coal from McGlothlin Bros., with 32.32% Volatile, is not suitable for loading with your coal. Coal from the J. H. McGlothlin Mine should be cleaned up before taking additional tonnage."

Plaintiff's Exhibit 22, dated July 6, 1955, reads, in part, as follows:

> "In line with our telephone conversation last week, we suggest that you make every effort to control the quality of your coal, loading only a low Ash product. Louis Hunter will be glad to work along with you, inspecting the trucks and the mines from whom you are buying the coal, as it is absolutely essential that you load a better quality coal than indicated by the above three analyses."

Plaintiff's Exhibit 23, dated November 26, 1955, reads as follows:

> "On November 10th Louis Hunter sampled four cars of your nut and slack loaded at Doran.
>
> "We understand this coal consisted of a mixture of Tiller, *Jawbone* and Red Ash. You will note that the composite Ash of the 12 cars ran 12.73%.
>
> "The market today is very selective and there are very few outlets for coal analyzing as high in

Ash as yours. Suggest you take steps to reduce your ash content."

The letter just referred to shows that McCall did not object to the shipment of *Jawbone*, or other purchased coal, if the Ash content could be reduced. However, as previously pointed out, Culbertson testified that Whitewood ceased shipping Jawbone to McCall in the early part of 1951.

Plaintiff's Exhibit 40, dated February 10, 1950, reads as follows:

"Enclosed is an order for four cars RCM, in line with your conversation with Mr. Clyborne. As we understand it, cars shipped against this order will contain a mixture of coal.

"Please do not load over four cars of this mixed coal. We are behind on our Government contract for your Mine Run and since your coal not mixed is running so high in Ash, we are absolutely afraid to apply any mixed coal on this contract."

Plaintiff's Exhibit 41, dated July 3, 1952, reads as follows:

"Enclosed is copy of analysis obtained from sample taken by you from Shelton Mine.

"This analysis shows up satisfactorily, if the sample was taken properly. By this I mean if proper percentage of slack was taken in proportion to percentage of lump."

Plaintiff's Exhibit 42, dated March 16, 1955, reads as follows:

"Enclosed is copy of a complete analysis covering sample of your ROM taken from N&W 24795.

"This is very punk stuff and suggest that you discontinue buying this off quality coal, as it

certainly will ruin your record with the government and bring your average analysis down to such an extent that we will not have a Chinaman's chance in obtaining the business this year.

"I am afraid the eight or nine cars that you have already shipped are going to play havoc."

Plaintiff's Exhibit 43, dated December 19, 1951, reads as follows:

"Enclosed analysis covering sample of coal from Stanley Harris and Russell Stinson, taken at your direction, shows the following:

"ASH 10.47%

"This coal is of such poor quality, our suggestion is that you would be better off by forgetting about it."

Plaintiff's Exhibit 44, dated August 20, 1952, reads as follows:

"We are enclosing the following Bureau of Mines' analysis covering shipments made by you under the new contract with the Government:

"Sample dated July 31	–	302.00 tons – Fuel Yard #2
"Sample No. 12 undated		272.00 tons – Fuel Yard #2
"Sample dated August 7		157.00 tons – Fuel Yard #2
"Sample dated August 5		184.00 tons – Fuel Yard #2

"Please note that the Volatile content on your coal ran from a low of 26% to a high of 27.30%. This is entirely out of reason and indicates that a considerable amount of Red Ash or other coal is being mixed with your Mine Run.

"If your Volatile continues to run 27%, we may as well start working to place your coal elsewhere, for the chances are the Government will cancel this contract."

However, despite McCall's numerous complaints concerning the quality of the coal shipped by Whitewood,

McCall continued to accept and sell, every car of coal shipped by Whitewood. During the entire period in controversy, McCall never rejected or refused to sell one single car of Whitewood's coal. During the entire period in question, McCall made monthly settlements with Whitewood and in these monthly settlements purported to account to Whitewood for the proceeds of coal sold, less selling commissions. As pointed out above, McCall was penalized at times for impurities in the Whitewood coal. However, these penalties were passed on to and paid by Whitewood. There is no evidence in the record that McCall ever paid a single penalty for which it was not reimbursed by Whitewood.

2. The Jawbone Coal

Jack Persinger, a certified public accountant, prepared Plaintiff's Exhibit 20 introduced before the Special Master. According to this exhibit, during the period July 20, 1948, to December 31, 1951, the total tonnage of coal shipped by Whitewood to McCall was 167,254.00 tons. During the same period, the total tonnage of Jawbone coal available to Whitewood for shipping, was 26,700.68 tons.

Therefore, the total Jawbone available to Whitewood during the period in question was 15.96% of the 167,254 tons of coal shipped by Whitewood to McCall. However, during this same period Whitewood shipped to McCall, and to other purchasers, a total of 201,858.05 tons. Therefore, the Jawbone coal shipped during that period would be 13.22% of 201,858.05 tons, the total tonnage shipped by Whitewood to all

parties. During the period in question, 34,604.05 tons of coal was shipped by Whitewood to parties other than McCall.

Since Whitewood had only one tipple, and all coal mined by Whitewood, and all coal purchased by Whitewood, was run through the same tipple, and mixed and commingled, it was not thereafter possible to identify any particular car of coal as coming from the Cary lease, the M. D. Hinton Jawbone lease, or purchased coal. Under these circumstances, it is not possible to determine how much of the Jawbone coal available to Whitewood during the period in question was actually received by McCall.

Culbertson testified that Jawbone coal was a "high Ash coal" but otherwise it was a "very good coal" (Tr. 431).

Culbertson further testified that he could not recall that defendants had ever objected to Whitewood acquiring outside coal and shipping it to McCall, but that in the early part of 1951, Clyborne did request Whitewood to discontinue shipping Jawbone (Tr. 422-3, 429-430, 488). Thereupon Culbertson assured Clyborne that Whitewood would discontinue shipping Jawbone to McCall. In the early part of 1951, Whitewood shut down its Jawbone mine and did not thereafter ship any Jawbone coal to McCall (Tr. 429-30, 488). Later, in November 1955, after Whitewood had mined out the Cary coal on the Gillespie Hinton lease, it again opened its Jawbone mine and continued mining Jawbone through 1956, 1957, 1958 and 1959. However, none of such Jawbone was shipped to McCall (Tr. 487-8).

Culbertson testified that the reason Whitewood shipped Jawbone coal to McCall, to be applied on

government orders, was that Universal Coal Company, in which Clyborne had an interest, also had a comparable government contract, and that Universal was shipping Jawbone, acquired from Whitewood, on its contract with the government. Under these circumstances, Whitewood, in 1950 and early 1951, also shipped Jawbone to McCall, to be applied on Whitewood's government contract (Tr. 431-2).

Clyborne testified that for many years he had had an interest in Universal Coal Company, owning 380 shares of its stock; that Universal had a tipple and ran Jawbone coal through the tipple "until we raised hallelujah; and stopped it." (Tr. 168-9).

After Whitewood ceased shipping Jawbone to McCall in the early part of 1951, McCall continued to accept and sell all coal shipped to it by Whitewood, and purported to account to Whitewood, each month, for the full proceeds of sales, less selling commissions, and any penalties that had been inflicted.

Shortly after December 31, 1955, the Cary seam of coal on the Gillespie Hinton lease was mined out and Whitewood ceased shipping coal to McCall. Thereafter McCall and Whitewood fully settled their accounts.

Neither of defendants ever made a claim of any kind against Whitewood on account of the mixing and shipment of such coal, until subsequent to July 23, 1968, when defendants filed their First and Second Counterclaims.

ARGUMENT

I.

THE EVIDENCE IS ENTIRELY INSUFFICIENT TO HAVE JUSTIFIED THE SPECIAL MASTER, THE DISTRICT COURT, OR THE CIRCUIT COURT OF APPEALS, IN DENYING WHITEWOOD RELIEF HEREIN ON THE GROUND THAT IT DID NOT COME INTO COURT WITH CLEAN HANDS.

The basis of defendants' claim that Whitewood did not come into Court with clean hands, and thus is not entitled to recover the proceeds of sales of its coal, is that during the period July 1, 1948 to December 31, 1955, Whitewood, without the knowledge, consent or approval of defendants, and for the purpose of defrauding defendants, purchased outside coal, and mined Jawbone coal from the Jawbone seam on the M. D. Hinton tract, and mixed the coals with Cary coal mined on the Gillespie Hinton tract, and shipped the mixed coals to McCall. However, the evidence heard in the District Court and by the Special Master shows clearly and conclusively that the defense of Whitewood's "unclean hands" is an utterly frivolous contention.

As has been shown, the defendants knew at all times that Whitewood had only one tipple. Defendants knew that Whitewood was mining Cary coal from the Gillespie Hinton lease, Jawbone coal from the Jawbone seam on the M. D. Hinton tract, and purchasing outside coal, and that all of the coal was run through Whitewood's tipple and mixed and commingled, and

that McCall received a substantial amount of the mixed tonnage.

Defendants' inspectors visited Whitewood's operation at regular intervals and reported to McCall. The only purpose in having inspectors on the job was to check on the source and the quality of the coal received by Whitewood, and the shipments to McCall, and it can be assumed that defendants' inspectors did their job properly. These inspectors must have seen the purchased coal arriving in trucks, and being dumped into Whitewood's tipple along with the Cary coal mined on the Gillespie Hinton lease, and the Jawbone mined by Whitewood on the Hinton tract.

Although McCall complained from time to time about the quality of the coal it received, and in the early part of 1951 requested Whitewood to discontinue shipping Jawbone, McCall continued to do business with Whitewood, and accepted and sold every car of coal shipped to it by Whitewood, until about December 31, 1955, when the Cary coal on the Gillespie Hinton lease was mined out, and purported to account to Whitewood for the proceeds of sales, less selling commissions, and any penalties that might have been inflicted.

There is no substantial evidence in the record to the effect that Whitewood ever attempted to conceal its operations from defendants, or to defraud defendants in any way. To the contrary, Plaintiffs' Exhibits 21, 22, 23, 40, 41, 42, 43 and 44 filed before the Special Master – all being letters from Robert E. Perkinson, McCall's representative, to Culbertson – indicate clearly that McCall was kept fully informed as to the sources,

and analyses, of the outside coal shipped by Whitewood to McCall.

If, however, the evidence heard in the District Court and by the Special Master, could possibly have justified a finding that Whitewood, during the period 1948 to 1955, acted wrongfully toward defendants, such conduct is not sufficient to deny Whitewood the right to now recover from defendants, the proceeds of sales of Whitewood's coal, which defendants received during the period 1948 to 1955, and for which they have not accounted. There are many reasons why the "clean hands" doctrine has no application whatever to the facts of this case.

A. The Alleged Misconduct Of Whitewood, During The Period 1948 To 1955 Is Not Sufficiently Connected With, Or Related To, The Present Controversy Between Plaintiff And Defendants, To Justify The Application Of The "Clean Hands" Doctrine.

As we have previously pointed out during the period July 1, 1948 to December 31, 1955, Whitewood shipped to McCall a total of 246,014.10 tons of coal. Approximately 50,000 tons of this coal was purchased by Whitewood from other persons. Some of the coal shipped by Whitewood to McCall was Jawbone coal mined from the Jawbone seam on the Hinton tract. McCall, with full knowledge of the facts, accepted all of said coal and sold it but fraudulently concealed from Whitewood the actual proceeds of sales of the coal, and fraudulently underpaid Whitewood for the coal. Now

that defendants' fraudulent conduct has been discovered, and judicially ascertained in this case, the defendants contend that plaintiff is not entitled to recover such proceeds of sales, for the reason that Whitewood was guilty of improper conduct in mixing the outside coal with the leasehold coal, and shipping the mixed coal to McCall.

However, if under the circumstances, Whitewood was guilty of any improper conduct, such conduct is not sufficiently connected with, or related to, the present action which was brought to recover from defendants the proceeds of sales of Whitewood's coal, less the selling commissions, and any penalties which might have been inflicted.

> "Generally, the applicability of the maxim, 'he who comes into equity must come with clean hands,' depends upon the connection between the complainant's iniquitous acts and the defendant's conduct, which the complainant relies upon as establishing his cause of action. Relief is not to be denied because of general iniquitous conduct on the part of the complainant or because of the latter's wrongdoing in the course of a transaction between him and a third person, or because of a wrong practiced by both parties on a third person, or because of misconduct by a company taken over by the plaintiff where the latter put a stop to the misconduct as soon as knowledge of it was acquired. In other words, the maxim may not be invoked by reason of acts which are not shown to have been connected with the transaction giving rise to the suit or otherwise to have been related to the defendant or anything in which he was interested."
>
> 27 Am. Jur. 2d 678-679

In the case of *Heck v. Morgan*, 106 S.E. 413, 88 W.Va. 102, Syl. 9 reads as follows:

> "The maxim, 'He who comes into equity must come with clean hands,' does not deprive a suitor of a right to appeal to a court of equity on account of general iniquitous conduct unconnected with the act of the defendant which the complainant party sets up as his ground or cause of action, but only when the evil practices and wrongful conduct pertain to the particular matter or transaction in respect to which judicial protection or redress is sought."

Other West Virginia cases hold that fraud or misconduct of a plaintiff pertaining to transactions distinct from those constituting the subject matter of plaintiff's suit against defendant, is not sufficient to preclude relief under the principle that plaintiff in equity must come with clean hands.

Ihrig vs. Ihrig, 88 S.E. 1010, 78 W. Va. 360
Bias vs. Bias, 155 S.E. 898, 109 W. Va. 621
White vs. Graham, 164 S.E. 664, 112 W. Va. 451
Miller Todd Coal Co. vs. Adrian Fuel Co., 1 S.E.2d 873, 121 W. Va. 138

If, in fact, Whitewood was guilty of any improper conduct towards defendants during the years 1948 to 1955, such conduct was not related to, or connected with plaintiff's present claims against defendants. Any such conduct on Whitewood's part is entirely too remote, and unrelated to plaintiff's right to recover the proceeds of sales of Whitewood's coal, in this action.

B. The Doctrine Of Unclean Hands Is Not Applicable To This Case, Since The Evidence Shows Clearly That The Defendants Were Not Injured Or Damaged In Any Way By Whitewood's Alleged Wrongful Conduct.

As we have previously pointed out, defendants' answer to the Second Amended and Supplemental Complaint, contained two counterclaims – the First Counterclaim and the Second Counterclaim. The Second Counterclaim alleged that it was Whitewood's duty, under said lease and agreement (Pl. Ct. Ex. No. 1), to ship to McCall *only* the coal mined on the leased premises, but that Whitewood, without McCall's knowledge, consent or approval, purchased a large quantity of coal, inferior in quality to the coal mined on said lease, and mixed the purchased coal with the coal mined on the leased property, and shipped the mixed coal to McCall, and that McCall, without knowledge of the facts, shipped said coal to its customers and thereby sustained damage.

A considerable amount of evidence was heard by the Special Master with reference to the mixing and shipping of the outside coal by Whitewood to McCall. However, it soon developed that during the entire period 1948 to 1955, McCall was fully aware of the mixing and shipping of the outside coal and actually encouraged such shipments by Whitewood.

The evidence was so clear and convincing that defendants abandoned their two counterclaims and did not even refer to them in their briefs to the Special Master, to the District Court, or to the Circuit Court of Appeals.

The Special Master held that defendants were not entitled to recover from Whitewood on either of the counterclaims and this finding was approved by the District Court. Defendants did not complain of this finding in the Circuit Court of Appeals.

Therefore, it clearly appears that defendants' damage claims against Whitewood, for the mixing and shipping of said outside coal by Whitewood to McCall, have been fully adjudicated and decided adversely to defendants, and defendants are not now in a position to assert that they were in fact damaged in any way by Whitewood's conduct in mixing and shipping the outside coal. Under these circumstances, the clean hands doctrine has no application whatever to this case.

> "As a general rule, the doctrine of unclean hands is applicable only where the party seeking to invoke it was injured by the alleged wrongful conduct. If the alleged wrongful conduct of the complainant appears not to have injured, damaged, or prejudiced the defendant, the maxim may not be successfully invoked, where the wrongful conduct was not contrary to law or public policy. Thus, it has been held that the maxim should not be applied where the defendant has not been seriously harmed and the wrong complained of can be corrected. A fortiori, where the defendant has profited by the wrongful conduct, he is in no position to invoke the maxim."
>
> 27 Am. Jur. 2d 681.

C. The Clean Hands Maxim Is Subject To Reasonable Limitations. The Maxim Is Not One Of Absolutes And Should Be Applied In The Court's Discretion, So As To Accomplish Its Purpose Of Promoting Public Policy And The Integrity Of The Courts.

The defendants in this case have been found guilty of gross and repeated frauds in the selling of Whitewood's coal. They not only deceived Whitewood with reference to the prices they were receiving on the sale of Whitewood's coal, but without Whitewood's knowledge, consent or approval, the defendants sold Whitewood's coal to American Southern Export Company, a corporation in which the defendants had substantial interest, and which they controlled. (See Special Master's Report, App. 76a).

However, defendants' fraudulent practices were not limited to Whitewood. McCall, while acting as sales agent for Pine Oaks Coal Corporation, during the period 1955 to 1961 inclusive, wilfully and intentionally misrepresented to Pine Oaks the prices it received for Pine Oaks coal, and wilfully and intentionally underpaid Pine Oaks for its coal. (See D. Ct.'s Memorandum Opinion filed September 28, 1967, App. 22a - 27a).

Under these circumstances, would the application of the clean hands doctrine to the facts of this case, and the denial of plaintiff's right to recover from defendants, advance right and justice, and promote public policy? We respectfully submit that the answer to this question should be an emphatic no.

> "The clean hands maxim is subject to reasonable limitations. Generally, it may be invoked only to prevent affirmative equitable relief. The maxim is

not one of absolutes and should be applied in the court's discretion, *so as to accomplish the purpose of promoting public policy and the integrity of the courts.*"

27 Am. Jur. 2d 669.

"* * Thus, the requirements of public policy will be considered in determining the applicability of the maxim." (clean hands maxim)

27 Am. Jur. 2d 668.

"The maxim is not used, however, merely as a means of punishing a complainant for wrongful, immoral or illegal acts. It is applied in the interest of the public and to protect the court and the defendant, but not to favor him."

27 Am. Jur. 2d 671.

To the same effect, see: *Ford v. Buffalo Eagle Colliery Co.* (CCA 4th) 122 F.2d 555; *Keystone Driller Co. v. General Excavator Co.* 290 U.S. 240, 78 L.Ed. 293, 54 S. Ct. 146; *Baue v. Embalmers Federal Labor Union* (Mo.) 376 S.W.2d 230; *Waller v. Eanes Admr.* (Va.) 157 S. E. 721.

"It is generally recognized that though the parties are in pari delicto, equity may intervene from motives of public policy. Thus, although the parties are shown to have been in pari delicto, the court will grant relief to one of them if its forbearance will be productive of an offense against public morals or good conscience or be a reflection upon the integrity of the court, or productive of perjury."

27 Am. Jur. 2d 677-8.

"It very clearly appears in Virginia that the equitable maxim that he who comes into equity must come with clean hands is subservient to the

public policy of the state and cannot be invoked in contravention thereof. * * While, as said in *Nunnally v. Stokes*, a party cannot make his own fradulent conduct a ground of defense or recovery, he may nevertheless show all of the facts and invoke well recognized equitable doctrines, if applicable, to prevent the greater wrong."

Waller vs. Eanes, Admr. (Va.) 157 S.E. 721, 725.

We certainly do not concede that Whitewood was guilty of fraudulent or improper conduct in its dealings with the defendants, and submit that the evidence does not justify any such finding. However, if the evidence could possibly justify such a finding, nevertheless for the reasons shown, the clean hands doctrine has no application to this case, and should not defeat plaintiff's right to recover.

II.

IN FINDING THAT WHITEWOOD WAS ENTITLED TO RECOVER FROM DEFENDANTS, BUT THAT DEFENDANTS WERE NOT ENTITLED TO RECOVER UNDER THEIR SECOND COUNTERCLAIM AGAINST WHITEWOOD, THE SPECIAL MASTER NECESSARILY FOUND THAT WHITEWOOD WAS NOT GUILTY OF FRAUDULENT CONDUCT WHICH PRECLUDED RELIEF TO WHITEWOOD.

Under Conclusion of Law, the Special Master found:

"13. Plaintiff owes nothing to defendants on account of coal mined from the leasehold

described in the agreement of June 20, 1947 and shipped by Whitewood to others than McCall during the period June 10, 1947 to December 31, 1955, *or as damages because of coal shipped by Whitewood to McCall which came elsewhere than from the leasehold*; nor are defendants entitled to recover punitive damages from plaintiff in this action." (App. 78a)

The "clean hands" defense now being asserted by defendants, is based entirely on Whitewood's alleged fraudulent conduct in acquiring outside coal, mixing the outside coal with Cary coal mined on the Gillespie Hinton lease, and shipping the mixed coals to McCall, without McCall's knowledge, consent or approval. *Precisely the same facts were alleged in support of defendants' Second Counterclaim.*

However, the evidence heard by the Special Master showed clearly that defendants were not entitled to recover damages from Whitewood, on account of defendants' Second Counterclaim, and the Special Master expressly so held. In fact, the evidence in support of the First and Second Counterclaims was so weak, and unsubstantial, that the defendants abandoned their counterclaims, and did not mention either counterclaim in their briefs filed with the Special Master, the District Court, or in the Circuit Court of Appeals. Neither was the dismissal of the two counterclaims in the District Court, assigned as error in the Circuit Court of Appeals.

Therefore, if defendants' evidence in support of their Second Counterclaim, was so weak and unsubstantial that defendants simply abandoned the counterclaims, and the Special Master and the District Court decided the counterclaims adversely to defendants, but awarded

plaintiff a substantial recovery against defendants, how can it now be logically contended that Whitewood was guilty of fraudulent conduct during the period 1948 to 1955, which precludes plaintiff's right to recover herein. Such a contention is without any substantial basis, and is utterly frivolous.

We are not aware of any rule of law that required either the Special Master or the District Court to make a *specific* finding to the effect that Whitewood was not guilty of "unclean hands". It was sufficient that the affirmative facts found by the Special Master and the District Court, considered as a whole, completely negatived defendants clean hands contention.

In *Carr v. Yokohama Specie Bank, Limited* (CCA 9th Cir. 1952), 200 F.2d 251, 255, the court, in discussing the requirements of Rule 52, stated:

> "The question whether the showing made is clear and convincing is one for the trial court. And the federal rule relating to findings of a trial court does not require the court to make findings on all facts presented or to make detailed evidentiary findings; if the findings are sufficient to support the ultimate conclusion of the court they are sufficient. * * * Nor is it necessary that the trial court make findings asserting the negative of each issue of fact raised. It is sufficient if the special affirmative facts found by the court, construed as a whole, negative each rejected contention. The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence."

Carr v. Yokohama Specie Bank, Limited, above referred to, was cited with approval in *Darter v.*

Greenville Community Hotel Corporation (CCA 4th Cir.), 301 F.2d 70, 75.

> "The ultimate test as to the adequacy of findings is whether they are sufficiently comprehensive and pertinent to the issue to form a basis for the decision and whether they are supported by the evidence."
>
> Vol. 5A Moore's Federal Practice, pg. 2710.
>
> "And the court need not find on every issue requested, but a finding of such essential facts as lay a basis for the decision is sufficient."
>
> Vol. 5A Moore's Federal Practice, pp. 2713-4.
>
> "* * 'Clearly the rule does not require the court to make elaborate findings . . . upon all such facts as will present every possible view of the case.' Findings of the trial court 'are to be construed liberally in support of a judgment or older (sic) . . . Whenever, from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn.' "
>
> Vol. 5A Moore's Federal Practice, p. 2716.

III.

THE CIRCUIT COURT OF APPEALS, IN AFFIRMING THE JUDGMENT ENTERED BY THE DISTRICT COURT, DID NOT FAIL TO CONSIDER THE "CLEAN HANDS" DEFENSE.

The Petition for Certiorari states repeatedly that neither the Special Master, the District Court, nor the Circuit Court of Appeals *considered* the issue whether Whitewood had been guilty of fraudulent conduct

which foreclosed it from relief in a court of equity. However, these statements are most inaccurate, and without any basis whatever.

We have previously pointed out that the Special Master, in finding that plaintiff was entitled to recover from defendants, and that defendants were not entitled to recover damages from Whitewood, on their Second Counterclaim, *necessarily* found that Whitewood was not guilty of fraudulent conduct toward defendants, precluding it from relief in equity. This conclusion is inescapable.

We quote from the Special Master's Findings of Fact (App. 73a-74a):

> "3. McCall knew and consented to the shipping of outside coal to McCall by Whitewood, and neither McCall nor Whitewood made any distinction between the leasehold coal and the outside coal. Both McCall and Whitewood treated their transactions with each other as to all of the coal in the same manner.
>
> "4. There was an implied agreement between Whitewood and McCall that the same terms would apply to all of the coal shipped by Whitewood to McCall, that is, that McCall, as sales agent for Whitewood, would account to Whitewood for the outside coal in the same way that the agreement of June 30, 1947 required it to account for the leasehold coal."

The District Court in its Memorandum Decision and Judgment Order, dated December 15, 1972, stated (App. 79a):

> "The Special Master having filed his report and the parties having noted their objections and exceptions thereto, the Court, after careful con-

> sideration of the objections and exceptions and of the record in this case, is of the opinion that the findings of fact of the Special Master, viewed in the light of the requirement of Rule 53(e)(2) of the Federal Rules of Civil Procedure that the Court 'accept the Master's findings of fact unless clearly erroneous,' are supported by the evidence and that the conclusions of law set forth in the report correctly apply the relevant legal principles. It is accordingly hereby ORDERED that said report be, and it is, hereby confirmed as filed."

In view of what has been shown, how can it possibly be charged that neither the Special Master nor the District Court, *considered* the issue whether Whitewood had been guilty of fraudulent conduct which foreclosed it from relief. The facts found by the Special Master, and confirmed by the District Court, make it entirely clear that the "clean hands" issue was *considered* by the Special Master and the District Court and decided adversely to defendants.

It is true that the Circuit Court of Appeals did not discuss the "clean hands" issue, or make a specific finding with reference thereto. However, the Court did state (App. 90a):

> "Neither our review of the record nor any point raised on appeal leaves us with a definite and firm conviction that a mistake was committed by the district court in its factual findings and we cannot say that they are clearly erroneous. We therefore find no merit in this aspect of the appeal."

This statement clearly shows that the Circuit Court of Appeals did in fact *consider* every point urged by defendants on appeal, but found that there was no merit in any of the assignments of error.

The "clean hands" issue was raised in the Circuit Court of Appeals. The point was briefed and argued before the Court, by counsel for the parties. Later defendants filed a petition for rehearing on the sole ground that the "clean hands" defense had not even been *considered* by the Circuit Court of Appeals. The rehearing was denied. Under these circumstances, it is inconceivable that the Circuit Court of Appeals did not *consider* the "clean hands" issue.

We know of no rule of law that required the Circuit Court of Appeals to discuss the "clean hands" issue, and make a specific finding with reference thereto. No doubt the Circuit Court of Appeals felt that the point had so little merit, that it did not require or justify discussion.

However, even though the Circuit Court of Appeals did not discuss the "clean hands" issue, or make a specific finding with reference thereto, it is perfectly clear that the court did *consider* the point and decided it adversely to defendants. No other inference is possible.

For the foregoing reasons, we respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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